Supreme Court, U.S.
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No. 06-1677

IN THE

Supreme Court of the United States

Thomas Drennan Selgas,

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. ORIGINAL JURISDICTION PREREQUISITES FOR TAX COURT

Pursuant to I.R.C. §6212 the Secretary of the Treasury, after he makes a determination that there is a tax deficiency with respect to any tax imposed by subtitle A of the Internal Revenue Code, is required to send a Notice of Deficiency to the taxpayer. The courts have routinely held that a valid Notice of Deficiency is the prerequisite for the Tax Court to exercise jurisdiction.

The question raised is: Does the Secretary's failing to comply with the statutory provisions for making a determination by not following the provisions of I.R.C. §6020(b) and/or the issuance and sending of Notice of Deficiency by a person without delegated authority render the Notice of Deficiency invalid, thereby causing the Tax Court to lack jurisdiction?

II. REVIEWING COURT CONSIDERATION OF ON NON-RECORD EVIDENCE.

The courts are uniform in refusing to cite their decisions non-record or statements made in the parties' briefs not supported by evidence introduced into the record.

Lacking any support in the record, can the Tax Court and the Appellate Court, by implication, consider a statement in a brief submitted by the government that claims a person holding an office equivalent too but lacking the actual delegation of authority to be equivalent was permitted to issue and send a Notice of Deficiency?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Petitioner: "Thomas Drennan Selgas" and Respondent: "Commissioner of Internal Revenue").

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Sup. Ct. Rule 29.6 Thomas Drennan Selgas states:

1. He is not a subsidiary or affiliate of a publicly owned corporation; and

2. There is no publicly owned corporation, which is a party to this petition that has an interest in the outcome.

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PETITION FOR WRIT OF CERTIORARI

Thomas Drennan Selgas respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Tax Court's Final Decision (Appendix A) and Bench Decision (Appendix B) (per Judge Mark V. Holmes) were not unpublished. The 5th Circuit Court of Appeal's opinion (per Circuit Judges Smith, Wiener, and Owen) affirming the Tax Court decision is published at *Selgas v. C.I.R.*, 475 F.3d 697 (5th Cir. 2007) (Appendix D). A motion for rehearing was denied, but not published (Appendix E), nor was a stay of mandate sought.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on January 16, 2007 and the Motion for Rehearing was denied on March 21, 2007. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of I.R.C. §§6020, 6201, 6211, and 6212 are set forth in the Appendix.

STATEMENT OF THE CASE

A. Procedural History

On September 14, 2004, the Petitioner, Thomas Selgas (Selgas) received a document purporting to be a 90-day Statutory Notice of Deficiency. Selgas timely filed a petition to the Tax Court on December 8, 2004.

Selgas filed a Motion for Summary Judgment challenging the jurisdiction of the Tax Court which was heard and denied on the call date of October 31, 2005. When the case was called Selgas was seeking a redetermination of the deficiency on the basis that the tax was fully paid and claiming the purported Notice of Deficiency was invalid. A trial was held on November 1, 2005 and the Tax Court issued a bench opinion on November 2, 2005, holding the Notice of Deficiency was valid and affirming the alleged deficiency in its entirety. Judgment was entered on November 23, 2005. Selgas filed a Motion to Vacate the judgment on December 22, 2005. The Motion was denied without comment the same day. Selgas timely filed a notice of Appeal to the 5th Circuit Court of Appeals on March 15, 2006. The 5th Circuit upheld the Tax Court on January 16, 2007. A motion for Rehearing was denied on March 21, 2007.

B. Statement of Facts

On October 1, 2003 Selgas caused to be sent two sets of 1040 tax returns for the year 2002 to the Commissioner of Internal Revenue (CIR). These two tax returns were prepared and signed by two different accounting firms, Paul, Phipps, & Co., PLLC and Institute for Tax & Financial Services, Inc. respectively. The returns were completely filled out as far as the financial information needed to calculate the correct tax concerned, but were not signed by Selgas because they differed in the refund amount shown to be due to Selgas. The CIR did not process these returns.

On September 14, 2004, Selgas received a document purporting to be a 90-day Statutory Notice of Deficiency. Selgas timely filed a Petition with the Tax Court on December 8, 2004 seeking a redetermination of the purported deficiency, claiming the Notice of Deficiency was not valid. On September 26, 2005, Selgas filed a Motion for Summary Judgment on the basis that the Tax Court lack jurisdiction because the Notice of Deficiency was not valid. Selgas raised two issues: 1) the Notice was invalid because the Secretary failed to make a valid determination before issuing the Notice of Deficiency; and 2.) the Notice of Deficiency was not issued and sent by a person with delegated authority to do so. In his motion, Selgas submitted Freedom of Information Act (FOIA) material that he had received for the CIR's Disclosure Office to the Tax Court as evidence showing that the person who sent the Notice of Deficiency did not hold an office listed in the delegation order authorizing the issuance and sending of Notices of Deficiency.

On October 31, 2005 the Tax Court heard arguments on the Motion for Summary Judgment and ruled in its oral opinion that a Notice of Deficiency did not have to be signed. The Court did not address the fact of who sent the document, as specifically required in the law at I.R.C. §6212, nor did the Court directly address the delegation of authority issue, but nevertheless upheld the Notice of Deficiency as valid. The following day the Tax Court issued a bench opinion on November 2, 2005 holding that a return was not required to be made or signed by the Secretary, nor was a substitute return required and ruled that Notice of Deficiency was valid.

The Court issued its judgment on November 23, 2005 and Selgas responded with a Motion to Vacate the judgment on December 22, 2005. The Tax Court denied the motion the same day without comment.

Selgas appealed the Tax Court's decision on March 13, 2006.

Without oral arguments, the 5th Circuit upheld the Tax Court's decision. In it decision, issued on January 15, 2007, the Court rejected Selgas' argument that the Notice of Deficiency was issued by a person without delegated authority by noting that the government had stated in its brief that the person who issued the Notice of Deficiency was in an office with equivalent authority. But the Court reasoned that such an argument was largely irrelevant, as a signature was not required to make the Notice of Deficiency valid. The Court further ruled that the Notice of Deficiency was valid despite the lack of a substitute return prepared by the Secretary.

Selgas filed a Petition for Rehearing with the 5th Circuit. Said Petition was denied without comment on Mach 21, 2007. This Petition for a Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

A. Introduction.

Selgas is mindful of the criteria set forth in Supreme Court Rule 10 which are used to determine whether the Court should review a decision of an appellate court. The criteria which are applicable in this case are:

> 1.) A United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court;
>
> 2.) has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

3.) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.

Selgas is also mindful of the recent comments by U.S. Supreme Court Justices Scalia and Breyer from their appearance at the American Constitution Society and the Federalist Society event in Washington D.C. on December 5, 2006, which was recorded and posted on the C-SPAN web site at: rtsp://video.cspan.org/60days/ac010607.rm:

> We cannot judge a Judge simply on the basis of whether we like the outcome of the case. ... However, there is an implied responsibility to do so; when a panel of [Appellate] Judges fails to interpret the statutes reasonably, Judges are supposed to interpret the statutes reasonably even if they don't agree with them, because it is not up to them to decide what garbage law is. ... The only objective criteria [for an Appellate panel to make it's determination] are the words adopted by Congress and once you get away from giving them their fairest meaning, we are in trouble. [Justice Scalia]

> Subjective judgment of a Judge should not play a significant role in the outcome of the case. ... [Justice Breyer]

With these principles in mind, Appellant believes that in upholding the Tax Court's ruling the panel misapprehended certain legal and factual issues in light of Supreme Court decisions and other circuit court decisions, departed from the normal and usual course of judicial proceeding by not upholding the law as passed by Congress.

ISSUE I

The Tax Court does not have jurisdiction when a Notice of Deficiency is invalid due to:

- **The Secretary failing to comply with the statutory provisions for making a determination pursuant to I.R.C. §§6201(a)(1), 6211(a);**
- **The Secretary not following the provisions of I.R.C. §6020(b) to make a subscribed return which is necessary for a valid determination;**
- **The person who issued and sent said notice was without delegated authority from the Secretary to do so.**

A. Sub-issue 1.

The Secretary is required to make a determination of a tax deficiency prior to issuing and sending a Notice of Deficiency.

1. Synopsis of Statutory Requirements.

The statutory scheme that Congress intended as a roadway to filing a petition to Tax Court starts with the authority that the Secretary has for making assessments, which is found in I.R.C. §6201. In addition authorizing the Secretary to make inquiries, determinations and assessments of all taxes §6201 also states,

> "The Secretary shall assess all taxes determined by the taxpayer or by the Secretary as to which returns or lists are made under this title."

It should be noted, under I.R.C. §7701(a)(11), the term 'Secretary' has a special definition. 'Secretary of the Treasury' "means the Secretary of the Treasury, personally, and shall not include any delegate of his." But the term "Secretary" means the Secretary of the Treasury or his delegate. The term "or his delegate," according to subsection 7701(a)(12)(A)(i),

> "when used with reference to the Secretary of the Treasury, means any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the context."

This definition of delegate will be very important in the later discussion addressing the delegated authority source.

Since the Secretary has statutory authority to make assessments he also needs a statutory process of determining any such assessment. The following statutes explain the source of that authority.

First, The Secretary must determine that there is a deficiency. A deficiency, in simple terminology, is defined in I.R.C. §6211(a) as the amount of tax imposed by Title 26 which exceeds the sum of the amount shown on the taxpayers return, plus any previously assessed amounts, less any rebates. See *Laing v. United States*, 423 U.S. 161, 173-74 (1976) ("In essence, a deficiency as defined in the Code is the amount of tax imposed less any amount that may have been reported by the taxpayer on his return").

Thus, pursuant to the laws passed by Congress, in order for the Secretary to determine a deficiency there must be a return. As was quoted earlier, §6201 authorizes the Secretary to "assess all taxes determined by the taxpayer or by the Secretary as to which returns or lists are made under this title." This authority to assess is based on filing of returns, when either a taxpayer files a return or the Secretary files a return.

The provision in the Internal Revenue Code which permits the Secretary to make a return where a taxpayer

fails to make a return is found in I.R.C. §6020. It has two steps. §6020(a) is the first step. §6020(a) does not give any authority to make a return, but it does give the authority for the Secretary to invite the taxpayer to either make his own return or to sign the Secretary's calculation for a tax and waive the formal assessment process.

When the Secretary applies §6020(a) a "30 day letter" is sent to the taxpayer. This 30 day letter invites the taxpayer to file a tax return within a certain period of time or sign a form prepared by the IRS. The prepared form is generally Form 4549 which contains a calculation of the proposed tax. In effect, under §6020(a) the Form 4549 attached to the 30 day letter is treated as if it were, in fact, the taxpayers unsigned return. When the 4549 form is signed by the taxpayer it becomes his tax return. The practical aspect of this procedure is that a taxpayer may waive the notice requirements of the IRC in consenting to a deficiency assessment by signing the Form 4549.

This type of waiver has long been accepted. *Thomas v. Merchantile Nat'l Bank*, 204 F.2d 943, 944 (5th Cir. 1953) (interpreting a waiver executed by a taxpayer under §871, the precursor to §6213, as having "waived the ninety-day notice and other procedural requirements" of the statute). A duly executed IRS Form 4549 is a proper waiver of the deficiency notice requirements. See also *In re Barry*, 48 B.R. 600, 603 (Bkrtcy. E.D.Tenn. 1985) (discussing IRS Form 4549 as constituting "a proper waiver of [deficiency] notice as provided in I.R.C. § 6213(d)"); and *Aguire v. Commissioner*, 117 T.C. 324 (2001) (granting summary judgment to the IRS on the ground that petitioners signed IRS Form 4549, waiving their right to contest their tax liabilities, and thus precluding the need to send them a deficiency notice).

If a taxpayer neglects to respond to the '30 day letter' or fails to make a return or sign the Form 4549, step two

of §6020 becomes applicable. §6020(b) authorizes the Secretary to make a return from his own knowledge and from such information as he can obtain through testimony or otherwise, if any person "fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefore, or makes, willfully or otherwise, a false or fraudulent return." The status of such a return is stated in subsection (b)(2), i.e. "Any return so made and subscribed by the Secretary shall be *prima facie* good and sufficient for all legal purposes."

In the case of a taxpayer which has failed to file a return, once the Secretary has subscribed a return under I.R.C. §6020(b), the Secretary is then authorized to issue and send a Notice of Deficiency to the taxpayer. The Notice of Deficiency is also called a '90 day letter,' because once a valid Notice of Deficiency is issued I.R.C. §6213 mandates that when a taxpayer is sent a Notice of Deficiency he has 90, or 150 if outside the United States, to file a petition with the Tax Court for a redetermination of the alleged deficiency.

Through this process Congress intended that a valid Notice of Deficiency must be issued and served on a taxpayer before the Tax Court has authority to rule on the IRS alleged deficiencies. Pursuant to I.R.C. §6212(a) the IRS must issue a valid notice of deficiency to the taxpayer before the Tax Court can gain jurisdiction. See *Hempel v. United States*, 14 F.3d 522 (11th Cir. 1994) (holding that the Notice of Deficiency is the jurisdictional ticket to Tax Court). See also *Sealy Power v. Commissioner*, 46 F.3d 382 (5th Cir, 1995) ("Tax Court only has jurisdiction when the Commissioner issues a valid notice and the taxpayer files a petition for redetermination").

Thus, Congress created the United States Tax Court "to provide taxpayers with a means of challenging deficiencies made by the Secretary or the CIR, his

delegate, without first having to pay the alleged deficiency. Without such a forum, taxpayers would have to pay the asserted deficiency and then initiate a suit in federal district court for a refund." *Samuels, Kramer & Co. v. Commissioner,* 930 F.2d 975, 979 (2nd Cir. 1991). As an Article I court, the Tax Court is a court of "strictly limited jurisdiction." *Kelley v. Commissioner*, 45 F.3d 348, 351 (9th Cir. 1995). A notice of deficiency issued by the IRS pursuant to §6212 is the taxpayer's jurisdictional "ticket to the Tax Court." *Bokum v. Commissioner*, 992 F.2d 1136, 1139 (11th Cir. 1993) (quoting *Stoecklin v. Commissioner*, 865 F.2d 1221, 1224 (11th Cir. 1989)); *Spector v. Commissioner*, 790 F.2d 51, 52 (8th Cir. 1986) (citing *Laing v. United States*, 423 U.S. 161, 165 n.4 (1976)), and holding that "the determination of a deficiency and the issue of a notice of deficiency is an absolute precondition to tax court jurisdiction").

In a nutshell, the statutory authority for the Tax Court to have jurisdiction to adjudicate the validity of a tax deficiency determined by the IRS requires a valid Notice of Deficiency being issued pursuant to statutory guidelines. Without a valid Notice of Deficiency the Tax Court lacks jurisdiction. Selgas raised the issue at Tax Court that no determination had been made as the CIR did not make a return pursuant to §6020(b). Without such a return and subsequent determination the Notice of Deficiency was invalid and did not confer jurisdiction on the Tax Court.

The Tax Court rejected his argument and the 5th Circuit confirmed the Tax Court's decision.

2. Certiorari Is Merited Because the 5th Circuit's Decision Below Conflicts with Decisions of This Court.

The 5th Circuit cited *Laing v. United States*, 423 U.S. 161, 174 (1976) for the statement "Where there has been

no tax return filed the tax deficiency is the amount of tax due." This statement was taken out of context. Because of the misunderstanding of the 5th Circuit regarding the holding of the *Laing* court, its decision is in direct conflict with another Supreme Court decision. While the Laing court did make the forgoing statement it was not a general statement applying to all situations. In context, the statement was in relation to a particular section of the code, §6851 which made an exception to the normal deficiency procedure because the tax due under §6851 was "due immediately upon termination." This exception is not applicable in Selgas' case.

Furthermore, any decision that uses the statement in *Laing* out of context, will be in direct conflict with at least two other Supreme Court decisions. The Supreme Court in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 17 (1983) expressed its extreme reluctance to deviate from the principle that the language used by Congress is the intent of Congress. Accordingly, the Supreme Court will not interpret a portion of one statute taken out-of-context and apply it in such a manner as to render another portion of a statute superfluous, ineffective and unnecessary, This principle was made even more firm in *Freytag v. Commissioner of Internal Revenue,* 501 U.S. 868, 873 (1991) wherein the Court stated that, "When we find the terms of a statute unambiguous, judicial inquiry should be complete except in rare and exceptional circumstances." *Freytag* also reaffirmed at page 874 that "courts 'are not at liberty to create an exception where Congress has declined to do so.'"

Selgas filed returns that were not signed. This made them non-processable. In effect, it was the same as if he had not filed the returns. In such a situation §6020(b) becomes applicable. To claim no return is required in the case which has not been an exception by Congress is to

render §6020(b) "superfluous, ineffective and unnecessary."

Congress through its language required a return to be made where no return was filed. Selgas' situation does not conform to any of the exceptions provided by Congress. Accordingly, this Court needs to resolve the misinterpretation of the 5th Circuit regarding *Laing* and review the decision in light of the principles in *Franchise Tax Board* and *Freytag*.

3. The 5th Circuit's Affirming of a Tax Court's Ruling that no Returns are Required by the Secretary Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings and Has Sanctioned Such a Departure by the Tax Court as to Call for an Exercise of This Court's Supervisory Power.

A incredulous set of circumstances was presented by the CIR at the Tax Court. In an effort to by-pass the clear language of §6020(b) the CIR clams to have attached to the Notice of Deficiency a Form 13496.

The government answered the Petition and claimed that the Notice of Deficiency included, in addition to the two page notice, the unsigned agent's report (Form 4549) and a document entitled 'IRC Section 6020(b) Certification' (Form 13496). These additional documents were attached to the governments Answer to the Petition. Just prior to trial, Selgas stipulated that he received the invalid document purporting to be a Notice of Deficiency with the unsigned agent's report. But he did not stipulate to receiving the 6020(b) Certification document.

According to the CIR the Form 13496 and its accompanying documents were supposed to substitute for a return. The Tax Court accepted that argument.

What makes the argument incredulous is the testimony of the IRS paralegal allegedly confirming the existence of the form. According to the CIR, in its Appellee Brief, a paralegal testified at trial that "the Commissioner would, ***in the ordinary course of business*** attach that document to a notice of deficiency issued in a case like this where there is no record of receiving a return from the taxpayer." (Emphasis added). The alleged 13496 form that the paralegal was referring to was claimed to have been dated in July of the year 2004.

It would have been legally impossible for the paralegal to be truthfully testifying to the existence of the form 13496 in July of 2004 as a document used in the ordinary course of business when the document was not authorized until July 18, 2005.

The Tax Court on page 3 of its Bench Order delivered on November 2, 2005 specifically found that the Certification was in fact attached to the original Notice of Deficiency as claimed by the government.

The Tax Court relied on testimony by an IRS employee that "it was in keeping with its normal practice of preparing SFRs when the taxpayer has not filed." This statement by the IRS could not be true either factually or legally. The IRC Section 6020(b) Certification could not have been a part of the normal practice of the IRS procedures. The form was not even proposed until July 18, 2005. The Form 13496 first appeared in a temporary regulation in the Federal Register on July 18, 2005, see Fed. Reg. Vol. 70, No. 136, Monday, July 18, 2005, at page 41165.

Further temporary regulations regarding the 6020(b) Certification and the rational behind the temporary regulation can be found at Fed. Reg. Vol. 70, No. 136, Monday, July 18, 2005, pp 41144-46. Since the IRC

Section 6020(b) Certification otherwise known as Form 13496 was not legally available until July, 18, 2005, it could not have been used, either physically or legally on July 18, 2004.

Furthermore, by the IRS' own official announcement, the effective date of the use of the Form 13496 was not until July, 18, 2005. On September 6, 2006 the Commissioner issued Internal Revenue Bulletin, 2005-36, T.D. 9215. In relation to the regulations regarding the use of the Form 13496, also called IRC Section 6020(b) Certification the Deputy Commissioner, Mark E. Matthews, specifically stated the effective date of the rules governing the use of the Form 13496. The first indication of an effective date was in the introductory material wherein it was stated, "*Effective Date*: These regulations are effective July 18, 2005." The second warning of an effective date was at the conclusion of the Bulletin wherein it was stated, "This section applies to returns prepared under section 6020 after July 18, 2005." Thus, by the government's own official admission, the Form 13496 did not apply to returns prepared by the IRS until July, 18, 2005. Since the Form 13496 submitted as an alleged substitute for return was dated July 19, 2004, one year before it was deemed effective, it was clearly not authorized.

In face of the fact that the Form 13496 did not exist until one year after it was allegedly attached to a Notice of Deficiency, the tax Court found her testimony credible and ruled that a substitute for return was in fact prepared. The 5th Circuit ignored the argument in favor of the erroneous belief that no return was required at all.

The CIR clearly was attempting to by-pass the clear meaning of the laws passed by Congress, specifically, §6020(b). In essence the CIR was taking the position it was above the law passed by Congress and it could make

its own law. The Tax Court allowed it and the 5th Circuit did nothing to prevent it.

It should be noted, contrary to the government's position and the approval of it by the Tax Court and the 5th Circuit, the CIR is not above the law. The case of *Olpin v. Commissioner*, 270 F.3d 1297, 1300 (10th Cir. 2001) sets forth a very strong legal principle that is being ignored. It states, "The Supreme Court has stated that 'explicit statutory requirements [ ] must be observed and are beyond the dispensing power of Treasury officials.'" Quoting from *Angelus Milling Co. v. Commissioner*, 325 U.S. 293, 296 (1945) and citing *Lucas v. Pilliod Lumber Co.*, 281 U.S. 245 (1930). In other words, neither the IRS officials nor the courts can ignore the requirements of the Code.

For the foregoing reasons the Supreme Court needs to exercise its supervisory powers over the 5th Circuit and the Tax Court and remind both courts that the laws passed by Congress are to be complied with. This applies even to the CIR.

B. Sub-issue 2.

A Notice of Deficiency is not valid if it is issued and sent by a person that does not have the delegated power to issue and send it.

1. Factual Background.

In his Motion for Summary Judgment Selgas raised the undisputed fact that the document purporting to be a Notice of Deficiency received by Selgas was not issued, sent or signed by a person with delegated authority to issue and send the notice. Selgas specifically noted at Footnote #2 on page 2 of the Motion for Summary Judgment that the purported Notice of Deficiency was not properly signed in accordance with Delegation Order 4-8. In Exhibit 1, attached to the Motion for Summary Judgment Selgas explained in great detail that the person

signed the purported Notice of Deficiency was not authorized to either issue the notice, or to send it.

The purported Notice of Deficiency was signed by a Timothy A. Towns from the Compliance Center in Ogden, Utah. Pursuant to a FOIA request made by Selgas, it was discovered that Timothy A. Towns was, at the time of the alleged signature on the Notice of Deficiency on September 14, 2004, a "Supervisory Program Analyst."

Selgas included in Exhibit 1 of his Motion for Summary Judgment, at page 7, the entire Delegation Order 4-8. It reads,

> **Delegation Order 4-8** (Formerly DO-77, Rev. 28)
>
> 1. Authority to Issue Notices of Deficiency and/or Execute Agreements to Rescind Notices of Deficiency
> 2. Authority: To sign and send to the taxpayer by registered or certified mail any notice of deficiency.
> 3. **Delegated to**: Appeals Team Managers and Appeals Team Case Leaders (as to their respective cases); Large and Mid-Size Business (LMSB) Territory Managers; Small Business/Self-Employed (SB/SE) Field Directors: Accounts Management and Submission Processing; Campus Department Managers in SB/SE Compliance Services; SB/SE Compliance Field Territory Managers; SB/SE Technical Services Revenue Agent Reviewers **GS-12** and Tax Compliance Officer Reviewers **GS-09**; Tax Exempt/Government Entities (TE/GE) Reviewers **GS-12**; Wage & Investment (W&I) Directors: Accounts Management, Field Compliance Services and Submission Processing; W&I Territory Managers.

Delegated Order 4-8 specifically authorizes certain persons or offices to "sign and send to the taxpayer by registered or certified mail any notice of deficiency." It will be noted that a 'Supervisory Program Analyst' is not one of the persons with delegated authority to sign and send a notice of deficiency.

The government failed to dispute this fact with any evidence at all. Instead, the government responded in its response to the Motion for Summary Judgment by claiming that Towns' position was equivalent to a Department Manager. The claim was not supported by any evidence or legal authority whatsoever.

Exhibit D of Selgas' Motion for Summary Judgment contains a detailed description of Towns' position as a Supervisory Program Analyst. In general, his position involves advising the Director and other top management officials. There is no mention in the entire job description of a Supervisory Program Analyst having any contact with taxpayers, directly or indirectly. The Supervisory Program Analyst's job is to direct programs, not deal with taxpayers. A Supervisory Program Analyst is simply not a person or office listed in Delegation Order 4-8.

2. Certiorari Is Merited Because the 5th Circuit's Decision Below Conflicts with Decisions of This Court.

As a preliminary matter, it should be noted that it is well-settled law that government agents must operate within the confines of their authority. The Supreme Court in *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947), noted the clear duty and long standing principle that persons dealing with the government must verify the authority being exercised. The Supreme Court stated,

"Whatever the form in which the government functions, anyone entering into an arrangement

> with the government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power, and this is so even though, as here, the agent himself may have been unaware of the limitations of his authority." Id 332 U.S. at 384.

In other words, the source of an agent's authority or an agency's power is derived from two sources: that authority explicitly determined by statute passed by Congress or that authority that has been provided through delegation. If either of these two sources are lacking, the authority exercised is void. Selgas contends that the Notice of Deficiency is invalid in that it lacks authoritative power from both sources.

As a matter of law, it is essential for a federal employee to possess delegated authority to perform any particular act. The absence of delegated authority means that the act in question was beyond the scope of the employee's duties, and therefore unlawful.

Selgas presented in his Appellant Brief a wealth of cases that illustrate the necessity for a public employee to possess delegated authority.

The Supreme Court has held that the rules regarding the necessity for a government employee to have delegated authority to act apply with equal force in the field of tax law. In *Botany Worsted Mills v. United States*, 278 U.S. 282, 288-289, (1929), the mills and a subordinate revenue agent entered into an informal compromise agreement regarding the tax liability of the mills. That agreement was held invalid on the ground that the agent lacked delegated authority to make the agreement. See also *Louisiana Pub. Svc. Comm'n v. FCC*, 476 U.S. 355,

374 (1986), ("an agency literally has no power to act ... unless and until Congress confers power upon it").

The fact that a federal employee must operate within his delegated authority is not a new concept to the 5th Circuit. In *Ferguson v. F.D.I.C.*, 164 F.3d 894, 898 (5th Cir. 1999) the 5th Circuit adopted the *Federal Crop Ins. Corp.* principle and added "[T]hose who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." Citing *Heckler v. Community Health Services*, 467 U.S. 51, 63 (1984).

The Delegation Order, in its essence, is a jurisdictional boundary, just like that between the appellate courts of the 9th Circuit and the 5th Circuit. Both courts are equivalent, yet their jurisdictions are separate and distinct. Jurisdictional boundaries prohibit the 9th Circuit from reviewing a decision from a district court in the 5th Circuit.

All these cases point to the same conclusion, that as a matter of law, when an agent has no delegated authority to act and he does so, his act is void. Congress explicitly authorized the Secretary to send a notice of deficiency under I.R.C. §6212. That authority was delegated to certain offices or officers through Delegation Order 4-8. Delegation Order 4-8 did not include a "Supervisory Program Analyst." Timothy Towns had no delegated authority to issue and send a notice of deficiency. His acts of signing and sending the notice were void, thereby making the Notice of Deficiency sent to Selgas invalid. Since the Notice was invalid the Tax Court lacked jurisdiction.

ISSUE II

Lacking any support in the record, can the Tax Court and the Appellate Court, by implication, consider a statement in a brief submitted by the

government that claimed a person holding an office equivalent too but lacking the actual delegation of authority to be equivalent was permitted to issue and send a Notice of Deficiency?

A. Background.

As was set forth in detail in the previous sub-issue, Selgas challenged the jurisdiction of the Tax Court through a Motion for Summary Judgment. One of the reasons Selgas argued that the Tax Court lacked jurisdiction was that the purported Notice of Deficiency sent to him was not issued and sent by a person with the proper delegation of authority.

The CIR responded to the challenge in it response to the Motion for Summary Judgment by stating that the particular individual, Timothy A. Towns had authority to issue the notice. In it brief the CIR statement that even though the office which Towns occupied was not on the list set forth in Delegation Order 4-8, his office was nevertheless equivalent to the office of a Campus Department Manager. Accordingly, in the CIR's view Towns was authorized to issue and send the Notice of Deficiency. The CIR offered no legal authority for its position, nor did it submit any documentation supporting its conclusion. It was simply a statement made out of thin air with no record evidence to support it.

The Tax Court basically ignored the issue when it ruled on the Motion for Summary Judgment by side-stepping it. It ruled that a signature was not required to render a Notice of Deficiency valid. Later, when Selgas renewed the challenge in his Motion to Vacate, the Tax Court implicitly accepted the CIR when it denied the motion without comment. The 5th Circuit considered the CIR argument when it reached its decision to uphold the validity of the Notice of Deficiency.

B. Certiorari Is Merited Because the 5th Circuit's Decision Below Conflicts with Decisions of Other Circuit Courts.

The circuit courts that have addressed the issue of whether a court may consider non-record evidence or statement made in parties' brief not supported by the record has universally rejected such consideration. The following are circuit court cases to which the 5th Circuit is in conflict.

1.) *Duha v. Agrium, Inc.*, 448 F.3d 867, 879 (6th Cir. 2006) ("Arguments in parties' briefs are not evidence.");
2.) *McClendon v. Indiana Sugars, Inc.*, 108 F.3d 789, 795 (7th Cir. 1997) ("Evidence that was not proffered to the district court in accordance with its local rules is not part of the appellate record; it has no place in an appellate brief.);
3.) *Killen v. Reed & Carnick,* 105 F.3d 669 (10th Cir. 1997) ("Defendants' motion to strike nonrecord matter is GRANTED.");
4.) *Diversified Numismatic, Inc v. City of Orlando, FL,* 949 F.2d 382, 384 (11th Cir. 1991) ("We agree that appellants should not have referenced material not in the record, and we will not consider any non-record evidence or arguments [based] on non-record evidence.");
5.) *Riley v. City of Montgomery, Ala.*, 104 F.3d 1247, 1251 (11th Cir. 1997) ("We grant Defendants' motion [to strike] for those portions of Plaintiff's brief which refer to 'evidence' that is not in the record."); and
6.) *Whitsell v. Office of Personnel Management,* 135 F.3d 777 (Fed. Cir. 1998) (Neither of the newly submitted documents, however, was introduced into evidence or otherwise presented to the administrative judge or the full Board, and the parties have not argued that those documents are

> subject to judicial notice. We therefore have not considered those non-record materials in deciding this case.");

Finally, the 2nd Circuit illustrates the fundamental error in considering non-record evidence. In *Warner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1127-1128 (2nd Cir. 1989), the court stated, "The merest novice in the law knows that "[f]actual statements contained in a party's brief are not a part of the record." Citing *Matter of Frank Fehr Brewing Co.*, 268 F.2d 170, 183 (6th Cir.1959); and *Bono v. United States*, 113 F.2d 724, 725 (2d Cir.1940).

Thus, it is clear that the 5th Circuit's consideration of non-record evidence contained in the CIR's brief that were not supported by record evidence was error and in conflict with other circuit decision.

CONCLUSION

Seglas has show shown that the 5th Circuit's decision against him in conflict with several decisions of this Court and in conflict with other circuit decisions. Selgas has also shown that the decision of the 5th Circuit has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the Tax Court as to call for an exercise of this Court's supervisory power. Accordingly, the Supreme Court must grant the Petition for a Writ of Certiorari.

Respectfully Submitted on this 15th Day of June, 2007.

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